No. 241

In the

Supreme Court of the United States

October Term, 1942

Kansas City Life Insurance Company, a Corporation,
Petitioner,

v.

Carrie J. Parfet, Administratrix of the Estate of George W. Parfet, Deceased.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PEERLESS PRINTING COMPANY, DENVER

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Kansas City Life Insurance Company, a corporation, petitioner, respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered the 19th day of May, 1942 (R. p. 157).

QUESTIONS PRESENTED.

1. Whether it was reversible error for the District Judge in a civil case to reply to a query from the jury outside the presence of counsel under the following circumstances—no prejudice being shown and the answer being correct: The jury during its deliberations sent through the bailiff a written query whether proof of motive was necessary to establish suicide. The Judge, having

already instructed them to that effect, sent back the verbal answer, "No."

2. Whether in spite of Title 28, Sec. 391, U. S. C. A., and Rule 61 of the Rules of Civil Procedure, requiring a decision according to the substantial justice of the case and the disregard of technical errors not affecting the substantial rights of the parties, the said action of the District Judge in answering "No" outside the presence of counsel instead of in their presence, was per se reversible error.

3. Whether the evidence was such that no other verdict could have been sustained, and the alleged error in instructing the jury outside the presence of counsel was therefore necessarily harmless.

4. Whether as applied to *an action on an accidental death policy,* the Circuit Court of Appeals correctly decided the Colorado rule of law when it held it to require that "if under the evidence death by violence can be explained on any reasonable hypothesis other than suicide, it is the duty of the court or the jury to do so" or whether that is in conflict with applicable local decisions, as well as with applicable decisions of the United States Supreme Court and the Circuit Courts of Appeal of other circuits.

5. Whether in any event the federal courts are bound by the decisions of the state court on the question of the sufficiency of the evidence to sustain any verdict other than that rendered.

6. Whether in an action on an accidental death policy in which the question was accidental death or suicide, the exclusion of a statement by decedent made 50 days prior to his death showing future plans constitutes reversible error, where the fact that he had plans for the future was testified to by three other witnesses and was not disputed, where the proof of suicide related entirely to the few minutes preceding and following the explosion and statements by decedent before dying as to why he had done it, and where the only evidence of a disturbed frame

of mind related to a period of not more than a week prior to his death.

STATEMENT.

A policy of insurance issued by Kansas City Life Insurance Company on the life of George W. Parfet contained a double indemnity provision in the event of death by accidental means (R. p. 8). The insured died of injuries caused by an explosion of dynamite and the $6,000 life insurance—the face of the policy—was paid (R. p. 10). This suit was to recover the double indemnity for accidental death. The court submitted to the jury the question of whether death was accidental or suicidal, and the jury returned a verdict for the defendant company (R. p. 13).

The decedent was fatally injured on the morning of March 21, 1940, and died a few hours later. The coroner's certificate, which under a Colorado statute* is prima facie evidence, showed death by suicide (R. p. 151). The first witnesses who arrived after the explosion found Parfet, the decedent, pounding on a dynamite cap with a metal file (R. p. 28). Piled around were seven or eight sticks of dynamite (R. p. 29). Subsequent to the first explosion in which he was injured, he had crawled back to the dynamite house (R. p. 61). As the witnesses approached he warned them off and threw a stick of dynamite at one of them (R. pp. 61, 62). After they had seized his arms and had taken away the file, he was asked why he had done it, and he said he was in a jam (R. p. 62), a bad enough jam to want to kill himself (R.p. 30), but that it was neither women nor embezzlement (R. p. 48). When the doctor told him he might live, he begged the doctor to administer something to put him out (R. pp. 48, 49). His watch, ring and billfold were found in the doghouse-like powder maga-

Chap. 78, § 128, Colo. Stat. Ann., 1935, provides: " * * And any such copy of the record of a birth or death, when properly certified by the state registrar to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated."

zine from which he had taken the dynamite (R. p. 33). None of this evidence was disputed.

To meet it and to sustain her burden of proving accidental death, plaintiff relied on the presumption against suicide and on testimony as to how an accident might happen with dynamite (R. p. 87). There was no attempt to prove that it did happen in any of the possible ways recited (R. p. 87). Plaintiff's counsel stated, "Our only defense" (to the evidence of suicide) "is to have an expert show how it could reasonably have happened" (R. p. 87). Plaintiff also offered evidence of cheerfulness, family felicity and plans for the future, none of which was disputed (R. pp. 73, 80, 82, 94, 95).

After the case had been submitted to the jury and while the jury were engaged in their deliberations, they handed to the bailiff a note to the judge in which inquiry was made as to whether it was necessary that a motive be proved in order to warrant the jury in finding that the death was by suicide. The bailiff handed the note to a deputy United States Marshal; he took it to the residence of the Judge, and there handed it to him; the Judge directed the deputy to answer verbally "No"; and that was accordingly done (R. p. 149). The parties and their attorneys were not present, were not consulted and did not consent to such communication between the court and the jury. The answer, however, was correct and the matter to which the inquiry related had been covered in the instructions of the court, which had not been objected to by plaintiff.

STATUTES AND RULES INVOLVED.

Title 28, Sec. 391, U. S. C. A., provides:

> "* * * On the hearing of any appeal, * * * the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Rule 61 of the Rules of Civil Procedure provides:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

RULINGS OF THE COURTS BELOW.

After the jury's verdict for defendant, plaintiff moved for a new trial (R. p. 14) primarily because of the action of the Judge in answering the jury's question outside the presence of counsel. The District Court in overruling that motion said (R. pp. 19, 20):

> "The contention is that the Judge should not have held communication with the jury except in open court in the presence of the parties and their counsel. This is undoubtedly the rule, but the tendency of the late cases—to say nothing of the statute and rules—is not to set aside a verdict on a technicality of this kind unless prejudice is shown. Situations of this kind were in the minds of the Congress in enacting Title 28, Sec. 391, U. S. C. A." (which the court then quotes) "and Rule 61 of the Rules of Civil Procedure" (which the court then quotes).
>
> "Furthermore an examination of the whole record in this case forces the conclusion that no other verdict could have been reached by the jury than the one in question. The statements of the deceased Parfet at the time of his death standing alone are conclusive on this question, and had any

other verdict been rendered it would have been the duty of the court to set it aside, pursuant to Rule 50 (b). * * *

"See the discussion in Snyder v. Massachusetts, 291 U. S. 97, beginning on page 114 etc., where, p. 122, Justice Cardozo speaking of such technicalities says, in effect, that the immunities assured by the Fourteenth Amendment would be brought into contempt if gossamer possibilities of prejudice are to nullify a judgment pronounced by a court of competent jurisdiction."

The Circuit Court of Appeals reversed the case, holding that even though the court's answer was correct, it constituted reversible error, saying (R. p. 154):

"* * * The matter to which the inquiry related had been covered in the instructions of the court, and it may be conceded that the answer was a correct statement of the law. But where a case has been submitted to the jury and in the course of their deliberations the jury requests additional instructions, such instructions should be given in the presence of the parties or their attorneys, or after notice and an opportunity to be present. It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not affirmatively shown."

citing cases.

Defendant had contended that the error was necessarily harmless since no other verdict could have been sustained under the evidence. The Circuit Court, however, held that a special rule applied in Colorado and that in an action on an accident policy the court and jury must find against suicide—that is, that the death was accidental—

if the death could be explained on any other reasonable hyopthesis than suicide, saying (R. p. 154):

> "• • • In Colorado death by *unexplained* violence is presumed to have been accident, evidence establishing death by violence *without explanation as to the manner in which the violence was inflicted* constitutes prima facie proof that the death was accidental, Occidental Life Ins. Co. v. United States Nat. Bank of Denver, Colo., 98 Colo. 126, 53 Pac. (2d) 1180; and *if under the evidence death by violence can be explained on any reasonable hypothesis other than suicide, it is the duty of the court or the jury to so find,* Prudential Ins. Co. of America v. Cline, 98 Colo. 275, 57 Pac. (2d) 1205." (Italics our own throughout the brief.)

This, even though the violence and the manner in which it was inflicted, was clearly explained by the undisputed evidence of decedent's actions and statements after the explosion!

The court then held that the evidence did not conclusively establish suicide and the communication with the jury "cannot be regarded as harmless for the reason that under the evidence no other verdict could have been returned" (R. p. 154). In other words, the court held that in Colorado the burden of proof in an accident case was not on the plaintiff to prove accident, but on the defendant to prove suicide—and to prove it so conclusively that no other finding was possible.

The court further held that the exclusion of a statement by decedent made about 50 days prior to his death indicating plans for the future, was error (R. p. 156). It does not indicate whether it considers this error sufficient to justify reversal. That the decedent had plans for the future running beyond the date of his death was testified to by three other witnesses without objection (R. pp. 73, 80, 82, 83, 94, 95) and was undisputed. The court in its instructions twice called the attention of the jury to this evidence of decedent's future plans (R. pp. 145, 146).

REASONS FOR GRANTING WRIT.

(1) The Circuit Court of Appeals held that it was reversible error per se in a civil case to answer the question of the jury outside the presence of counsel even though the answer was correct and had already been covered in the instructions given to the jury and though no prejudice was shown. This is in conflict with the decision in *Sandusky Cement Co. v. A. R. Hamilton Co.* (C. C. A. 6), 287 Fed. 609; with *Outlaw v. United States* (C. C. A. 5), 81 Fed. (2d) 805; with *Ah Fook Chang v. United States* (C. C. A. 9), 91 Fed. (2d) 805; and with *Dodge v. United States* (C. C. A. 2), 258 Fed. 300; also with *Peppers v. United States* (C. C. A. 6), 37 Fed. (2d) 346; also with *Hagen v. United States* (C. C. A. 9), 268 Fed. 344; and with Rule 61 of the Rules of Civil Procedure and Sec. 391, Title 28, U. S. C. A.—which cases hold such error harmless.

The circuit courts are in absolute divergence as to the effect of the Albion Case (*Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853) in the light of the statute and the Rules of Civil Procedure.

(2) The Circuit Court of Appeals held the Colorado rule to be that in an action on an accident policy the court and jury must adopt any reasonable hypothesis other than suicide if under the evidence death by violence can be so explained, and relies upon the case of *Prudential Ins. Co. of Ameria v. Cline*, 98 Colo. 275, 57 Pac. (2d) 1205. The policy there involved was straight life insurance, not accidental death insurance, and the statement as to the law of Colorado is incorrect and in conflict with the following cases: *North American Accident Co. v. Cavaleri*, 98 Colo. 565, 58 Pac. (2d) 756; *Capitol Life Ins. Co. v. Di Iullo*, 98 Colo. 116, 53 Pac. (2d) 1183; *Occidental Life Ins. Co. v. United States Nat. Bank of Denver, Colo.*, 98 Colo. 126, 53 Pac. (2d) 1180; *Bickes v. Travelers Ins. Co.*, 87 Colo. 297, 287 Pac. 859 and *Roeber v. Cordray*, 70 Colo. 196, 199 Pac. 481.

(3) The Circuit Court of Appeals held itself bound

by what it deemed to be the Colorado rule—in an accidental death case—as to the burden of proof and the necessary evidence for a directed verdict, though contrary to the rule in the federal courts.

This is in conflict with *Crockett v. United States* (C. C. A. 4), 116 Fed. (2d) 646; *Gorham v. Mutual Benefit Health & Accident Ass'n* (C. C. A. 4), 114 Fed. (2d) 97; *New York Life Ins. Co. v. Sparkman* (C. C. A. 5), 101 Fed. (2d) 484; and *Herron v. Southern Pacific,* 283 U. S. 91, 75 L. Ed. 857.

(4) The Circuit Court of Appeals in an action on an accident policy held that if under the evidence death by violence can be explained on any reasonable hypothesis other than suicide, it is the duty of the court or the jury to so find.

This is in conflict with *New York Life Ins. Co. v. Gamer,* 303 U. S. 161, 82 L. Ed. 726; *Jefferson Standard Life Ins. Co. v. Clemmer* (C. C. A. 4), 79 Fed. (2d) 724; and *Provident Life & Accident Ins. Co. v. Nitsch* (C. C. A. 5), 123 Fed. (2d) 600.

(5) The question as to the meaning and applicability of Rule 61 of the Rules of Civil Procedure recently adopted by the Supreme Court, and Sec. 391, Title 28, U. S. C. A., is one of great public importance. Congress and the Supreme Court have attempted to improve and expedite the administration of justice by eliminating new trials and reversals for procedural errors not affecting the substantial fairness of the trial.

The Circuit Court of Appeals in this case has reversed on a procedural point without even mentioning or recognizing the existence of the rule or statute. A narrow construction or disregard of these rules will substantially impede the judicial reform sought to be attained.

The Circuit Court's ruling in this case seems a clear example of the evil sought to be cured. The error on which the case was reversed is of the most technical character—

simply that the answer "No" was given the jury when counsel were not present, instead of when they were present.

(6) The Circuit Court of Appeals' misconstruction of the Colorado rule on the burden of proof in accidental death cases by confusing it with the rule in straight life insurance cases, will result if uncorrected in confusion and protracted litigation in the accidental death cases arising in the United States Courts in the District of Colorado and will maintain a conflict as to the correct rule, both with the Colorado courts and the federal circuit courts of other circuits and the United States Supreme Court.

CONCLUSION.

For these reasons it is respectfully submitted that this petition should be granted.

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